

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:
BellSouth Interactive Media Services, LLC and
BellSouth Entertainment, LLC
Petition for Permanent Relief
CSR-6355-Z

MEMORANDUM OPINION AND ORDER

Adopted: August 17, 2004

Released: August 18, 2004

By the Chief, Media Bureau:

I. INTRODUCTION

1. BellSouth Interactive Media Services, LLC, and its parent company, BellSouth Entertainment, LLC (collectively, "BellSouth"), have filed the above-captioned petition for special relief ("Petition"), seeking a permanent waiver of Sections 76.602 and 76.640 of the Commission's rules with respect to BellSouth's cable systems in south Florida and Atlanta, Georgia.

II. BACKGROUND

2. Section 629 of the Communications Act, as amended ("Act"), requires the Commission to:

147 C.F.R. §§ 76.602, 76.640. Although BellSouth requests waiver of Section 76.602, we deem waiver of this section unnecessary because it incorporates by reference the standards identified in Section 76.640. Accordingly, we consider herein only BellSouth's request for waiver of Section 76.640.

2PODs are referred to for marketing purposes as CableCARDS. See, e.g., Petition at 1. Because the applicable rule refers to these security modules as PODs, we continue to use this term.

347 C.F.R. § 76.640(b). Section 76.640 also requires that, effective April 1, 2004, upon request of a subscriber, a cable system must replace any leased high-definition set-top box that does not include a functional IEEE 1394 interface with one that includes a functional IEEE 1394 interface or upgrade the subscriber's set-top box by download or other means to ensure that the IEEE 1394 interface is functional. 47 C.F.R. § 76.640(b)(4)(i). By July 1, 2005, cable operators are required to include both a DVI or HDMI interface and an IEEE 1394 interface on all high-definition set-top boxes acquired by a cable operator for distribution to subscribers. 47 C.F.R. § 76.640(b)(4)(ii).

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.⁴

The purpose of Section 629 is to afford consumers the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor (“MVPD”).⁵ The Commission has addressed a number of practical issues in order to foster a competitive market for the design, manufacture, and retail of navigation devices as required under Section 629.⁶ In 2003, the cable and consumer electronics industries adopted a memorandum of understanding that reflected a compromise agreement to integrate the navigation functionality of set-top boxes into television receivers.⁷ In the *Second Report and Order*, the Commission adopted the technical rules proposed as part of the MOU, with certain modifications.⁸ The rules adopted by the Commission in the *Second Report and Order* included a requirement that no later than July 1, 2004, all digital cable systems must support unidirectional digital cable products through the provisioning of PODs and conformance with the technical standards governing POD-Host interfaces and the POD copy protection system.⁹

III. DISCUSSION

3. The relevant standard for consideration of the request for waiver is found in Section 629(c) of the Act and Section 76.1207 of the Commission’s rules. Section 629(c) provides that the Commission:

shall waive a regulation adopted under subsection [629](a) for a limited time upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that

⁴47 U.S.C. § 549(a).

⁵*Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment*, 18 FCC Rcd 20885, 20887 (2003) (“*Second Report and Order*”). Navigation devices are “devices such as converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c).

⁶*See, e.g., Implementation of Section 304 of the Telecommunications Act of 1996 and Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998).

⁷*See* Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (Dec. 19, 2002), *Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers* (signed by Charter Communications, Inc., Comcast Cable Communications, Inc., Cox Communications, Inc., Time Warner Cable, CSC Holdings, Inc., Insight Communications Company, L.P., Cable One, Inc., Advance/Newhouse Communications, Hitachi America, Ltd., JVC Americas Corp., Mitsubishi Digital Electronics America, Inc., Matsushita Electric Corp. of America (Panasonic), Philips Consumer Electronics North America, Pioneer North America, Inc., Runco International, Inc., Samsung Electronics Corporation, Sharp Electronics Corporation, Sony Electronics, Inc., Thomson, Toshiba America Consumer Electronics, Inc., Yamaha Electronics Corporation, USA, and Zenith Electronics Corporation) (“MOU”).

⁸*Second Report and Order*, 18 FCC Rcd at 20891.

⁹*Id.* at 20895.

such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products.¹⁰

Similarly, Section 76.1207 provides that the Commission “may waive a regulation” adopted under the applicable subpart for a limited time, subject to the showing required under Section 629(c).¹¹

4. BellSouth states that it began construction of its digital cable system in 1995, initially deployed services in 1996, and currently offers analog and digital cable services to approximately 40,000 subscribers.¹² BellSouth’s video distribution system is based on the Americast partnership design, which incorporates the DVB system standard.¹³ Due to fundamental differences between DVB and the technical specifications adopted in the *Second Report and Order*, BellSouth’s cable systems in south Florida and Atlanta are incompatible with the Commission’s plug-and-play requirements.¹⁴ BellSouth asserts that compliance with these rules thus would require it to construct an entirely new cable system.¹⁵ Specifically, BellSouth states that it would be forced to purchase 65,000 new set-top boxes and two new cable system headends and to make more than 35,000 visits to subscriber homes.¹⁶ In addition, BellSouth claims that it would face significant financial, administrative, and operating challenges, including the need to maintain its original DVB system in addition to a new system in order to support the continued operation of its multichannel multipoint distribution service (“MMDS”).¹⁷ BellSouth states that it has considered a number of alternatives to modify its video platform to facilitate compliance with the plug-and-play rules, but has determined that all potential options are technically challenging and are either economically prohibitive or undesirable from a business and customer perspective.¹⁸ Accordingly,

¹⁰47 U.S.C. § 549(c).

¹¹47 C.F.R. § 76.1207.

¹²*Petition* at 3-4.

¹³*Id.* at 4. DVB is an open, non-proprietary standard. *Id.*

¹⁴*Id.* For example, because the *Second Report and Order* requires that digital cable systems operate on ATSC and SCTE digital standards, rather than the DVB digital system standard, it would be impossible for a plug-and-play host device to tune into any channel on the BellSouth system. *Id.* at 5. In addition, BellSouth states that BellSouth’s headends were not designed or intended to produce an SCTE-compatible output; to do so would require complete replacement of the headend. *Id.* BellSouth further states that differences in audio formats mean that a plug-and-play host device would be unable to decode BellSouth’s audio signals, that the emergency alert system (“EAS”) standards are incompatible, and that, in order to comply with the rules, BellSouth would need to reprogram its channels currently operating with a resolution of 480x480 to a resolution supported by ATSC. *Id.* at 6. Finally, BellSouth’s digital system was designed to operate without an out-of-band communications path, and thus would be unable to send authorization and decryption messages that can be received by a plug-and-play host device. *Id.*

¹⁵*Id.* at 4.

¹⁶*Id.* at 7.

¹⁷*Id.* BellSouth notes that its MMDS system has unique physical transmission characteristics that would require BellSouth to retain its current digital headend system for MMDS. *Id.* n.9. BellSouth asserts that the simultaneous operation of two cable systems at each headend location would result in burdensome operational, staffing, and facilities demands, and likely would cause customer dissatisfaction and service disruption. *Id.* at 7-8.

¹⁸*Id.* at 8. BellSouth analyzed four potential modification approaches: (i) retrofit of its existing headends and replacement of all non-compliant system elements; (ii) construction of an entirely new, parallel compliant system using groomers to adjust and pass through the video signals received by satellite; (iii) construction of a new, parallel system using encoders, rather than groomers; and (iv) deployment of an all-digital service in addition to the technical modifications involved in the other approaches. *Id.* at 8-10. BellSouth estimates that the capital

(continued...)

BellSouth requests that the Commission grant a permanent waiver for its cable systems in south Florida and Atlanta. BellSouth asserts that a permanent waiver is justified due to the virtually insurmountable burden and expense of compliance with the plug-and-play rules.

5. First, BellSouth contends that grant of a permanent waiver is warranted because BellSouth qualifies as a “small cable company” for purposes of the *Second Report and Order*.¹⁹ In the *Second Report and Order*, the Commission recognized that “there may be a negative cost impact upon some small systems as a result of compliance with these obligations.”²⁰ Accordingly, the Commission stated that, “[t]o the extent that small cable systems would experience economic hardship as a result of these obligations, we will consider waiver requests on a case-by-case basis.”²¹ BellSouth claims that, with a total of approximately 40,000 affected subscribers, it qualifies as “small” and should be granted a waiver based on economic hardship.²² Second, BellSouth argues that its system has been rendered “nonconventional” under Section 76.605(b) of the Commission’s rules and that a waiver is justified because its systems benefit the public interest by continuing to provide competition in the MVPD marketplace.²³ Third, BellSouth contends that the Commission has received requests for and granted permanent waivers of its technical rules in the past.²⁴ Thus, BellSouth argues, grant of its waiver request would be consistent with Commission precedent.

6. Fourth, BellSouth asserts that the circumstances it faces are more drastic and compelling than the underlying facts of any applicable precedent.²⁵ Specifically, BellSouth states that compliance in this case would require the retirement and replacement of approximately 65,000 set-top boxes and multiple headend units at costs ranging from \$20 to \$38 million—up to four times the cost of compliance in *Media General*.²⁶ In addition, BellSouth would be forced to operate two separate but intricately

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investment required to upgrade its headends and set-top boxes in order to comply with the plug-and-play rules would range from \$20 million (for a new system with groomers) to \$38 million (for a new all-digital system). *Id.* at 10.

¹⁹*Id.* at 10-11.

²⁰*Second Report and Order*, 18 FCC Rcd at 20898.

²¹*Id.*

²²*Id.* at 11.

²³*Id.* at 11-12. Section 76.605(b) of the Commission’s rules provides that “[c]able television systems distributing signals by using methods such as nonconventional coaxial cable techniques . . . and which, because of their basic design, cannot comply with one or more of the technical standards set forth in . . . this section, may be permitted to operate, provided that an adequate showing is made pursuant to 76.7 which establishes that the public interest is benefited.” 47 C.F.R. § 76.505(b). BellSouth asserts that its deployment has been rendered nonconventional because it pioneered a unique digital cable design that has proven to be inconsistent with the development of subsequent digital cable standards.

²⁴*Id.* at 12-14 (citing *Pace Micro Technology PLC Petition for Special Relief and Interim Relief*, 19 FCC Rcd 1945 (MB 2004) (granting a permanent waiver upon finding that a blanket recall of non-compliant set-top boxes would cause inordinate burden and expense); *Media General Cable of Fairfax County, Inc., Petition for Special Relief*, 14 FCC Rcd 9568 (CSB 1999) (granting a permanent waiver upon a finding that no reasonable purpose would be served by requiring the retirement or retrofitting of equipment where the replacement cost of such equipment was \$9.2 million); *Midcontinent Cable Co., Petition for Special Relief*, 15 FCC Rcd 6244 (CSB 2000); *GCI Cable, Inc., Petition for Special Relief*, 15 FCC Rcd 10843 (CSB 2000).

²⁵*Id.* at 14.

²⁶*Id.*

synchronized cable systems in order to continue providing the same level of service to its subscribers during a conversion.²⁷ BellSouth also claims that its subscribers would face disruptive residential visits and construction activity, and would require education regarding operation of new equipment, all of which likely would cause BellSouth to lose customers and related revenue.²⁸ Fifth, BellSouth argues that the competitive disadvantages of compliance would be exacerbated by the issuance of bidirectional plug-and-play rules, which BellSouth asserts would force it to revamp its system again at additional expense and administrative burden.²⁹

7. Sixth, BellSouth contends that in comparing the costs and burdens of compliance with the benefits, the Commission should acknowledge that BellSouth already provides high-quality analog and digital cable service that is compliant with preexisting Commission rules and regulations.³⁰ According to BellSouth, the benefits of compliance would be minimal because, with or without a waiver, BellSouth subscribers will receive high-quality service and will require set-top boxes in order to receive bidirectional services.³¹ BellSouth states that in order to ensure customer satisfaction, it will engage in ameliorative efforts to minimize the impact of interoperability difficulties, including providing a set-top box at a nominal cost for any customer requesting connection of a digital cable ready device to the BellSouth system.³² Finally, BellSouth argues that a waiver is necessary to preserve and promote MVPD competition.³³ BellSouth contends that the Commission has indicated a desire to maintain a competitive marketplace for the provision of MVPD services, and that grant of a permanent waiver will permit BellSouth customers to continue to enjoy the services of a strong MVPD competitor.³⁴

8. We find that grant of a waiver is in the public interest. BellSouth has made an appropriate showing under Section 629(c) that waiver is necessary to assist the development or introduction of a new or improved multichannel video programming service: grant of a waiver will allow BellSouth to continue to deliver digital services to its subscribers and remain a viable competitor in the MVPD marketplace. Requiring BellSouth to comply with Section 76.640(b) under these circumstances would disserve the public interest by making it impractical for BellSouth to deliver digital services to its subscribers and potentially eliminating a competitor from the MVPD marketplace. Because BellSouth's affected systems serve a combined total of only 40,000 subscribers, we believe that very few subscribers will be affected by the waiver. However, it is particularly important that purchasers of equipment designed to function with PODs be accommodated to the maximum extent feasible so that the intended benefits of this equipment are realized.³⁵ Accordingly, as a condition of the waiver, we will require BellSouth to provide any subscriber who requests connection of a digital cable ready television to the

²⁷*Id.*

²⁸*Id.* at 14-15.

²⁹*Id.* at 15.

³⁰*Id.*

³¹*Id.* at 15-16.

³²*Id.* at 16.

³³*Id.*

³⁴*Id.*

³⁵See *Cox Communications, Inc., Petition for Temporary Waiver of Requirement to Support Plug and Play Through Provisioning of Point of Deployment Modules for Cox Cable Systems Serving Pauls Valley and Chickasha, Oklahoma*, CSR-6332-Z, DA 04-2118 (MB rel. Jul. 14, 2004) (“Cox Waiver Order”) at ¶ 6.

BellSouth south Florida or Atlanta systems with a set-top box free of charge.³⁶ We emphasize that this waiver is specific to the circumstances identified by BellSouth.³⁷

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition for special relief filed by BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that BellSouth Interactive Media Services, LLC and BellSouth Entertainment, LLC are granted a permanent waiver of Section 76.640.

11. These actions are taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree
Chief, Media Bureau

³⁶BellSouth indicated that it intends to provide customers requesting plug-and-play connections with set-top boxes for a nominal fee. *Petition* at 16. BellSouth did not specify the amount or basis for determination of such fee. However, we do not believe that requiring BellSouth to provide these set-top boxes free of charge would impose a substantial economic hardship on BellSouth. Conversely, allowing BellSouth to charge a fee for these set-top boxes would cause economic harm to those subscribers who purchase digital cable ready devices with an expectation that they will be able to connect directly to the BellSouth network. In addition, any fee charged for these set-top boxes would unfairly add to the cost associated with digital cable navigation that purchasers of plug-and-play devices already have assumed in purchasing such devices. We recognize that there exists no cost-effective means for BellSouth to bring its cable systems in south Florida and Atlanta into compliance with the plug-and-play rules. Nevertheless, the unavailability of a complete solution does not exempt BellSouth from making any expenditures to minimize harm to consumers. Where we have previously granted a waiver of Section 76.640, we have required the cable operator to provide set-top boxes to affected subscribers free of charge. *See Cox Order* at ¶ 6. We see no reason that a cable operator seeking a permanent waiver should be treated differently in this respect from a cable operator seeking a temporary waiver.

³⁷Our decision to grant BellSouth's waiver request is based on the limitations of current technology. If future technological advancements offer a cost-effective means for BellSouth to comply with Section 76.640, we expect BellSouth to bring its south Florida and Atlanta systems into compliance as promptly as possible and to exchange any set-top box for a POD at the request of any BellSouth subscriber who has purchased a digital cable ready device. Grant of this waiver is further based on the fact that BellSouth constructed its network and commenced deployment of digital cable services on its south Florida and Atlanta systems well before Section 76.640 was adopted. We expect that any cable operator that constructs a new digital cable system will select a digital video system standard that is compatible with our plug-and-play requirements.

³⁸47 C.F.R. § 0.283.